and if at the same time they provide proper notice and an opportunity for hearing they will not be found unconstitutional as denying due process of law.

H. D. S.

GUARANTY — NECESSITY FOR NOTICE OF ACCEPTANCE — In its essence the guaranty is but a simple contract and as such is governed by the rules usually applicable to those instruments. In one respect, however, a notable divergence has arisen in a large number of American cases, when dealing with certain forms of guaranties. This difference occurs in connection with the formation of the contract, the mutual assent which is necessary, and consists in the necessity of notice being given to the guarantor that the guarantee accepts. This rule seems to have originated in two Federal decisions [1] early in the nineteenth century; and while probably *dicta* in those cases, it has now become the law, not only of the Federal courts, but of the great majority of the State courts as well.[2]

This necessity for giving notice is based on the assumption that the guarantor is the offeror, and that, unless notified, he is placed at a great disadvantage in that he does not know whether he has incurred any liability in respect of that offer, and so cannot take steps to protect himself. With this in mind, it is evident that, being based at least partially on public convenience, it has no bearing on certain kinds of guaranties.[3] And that this is true is shown by the fact that the interpretation of the instrument sued on is of prime importance. For if it is an absolute guaranty, there is general agreement that notice is unnecessary,[4] and so in certain other situations, as where it is given for a contract already made within the knowledge of the guarantor.[5]

A recent case [6] in Massachusetts is illustrative of one instance where notice is deemed unnecessary. An offer was made to a

[1] Russell v. Clark's Exrs., 7 Cranch 69 (U. S. 1812); Cremer v. Higginson, 1 Mason 323 (U. S. C. C. 1817).

[2] Sears v. Swift & Co., 66 Ill. App. 496 (1896); De Crener v. Anderson, 113 Mich. 578 (1897); Acme Mfg. Co. v. Reed, 197 Pa. 359 (1900); Miami Co. Bank v. Goldberg, 133 Wis. 175 (1907).

[3] The rules are summed up in Davis Sewing Machine Co. v. Richards, 115 U. S. 524 (1885), as follows: "If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract." See also Davis v. Wells, Fargo & Co., 104 U. S. 159 (1881).

[4] Boyd v. Snyder, 49 Md. 325 (1878); Wise v. Miller, 45 Ohio 388 (1887).

[5] Nading v. McGregor, 121 Ind. 465 (1889).

[6] Stauffer v. Koch *et al.*, 114 N. E. 750 (Mass. 1917).

prospective vendor of goods, to guarantee on certain terms. This was refused, and a proposition was sent back to the defendants with a blank guaranty, which they signed. The court held that this latter was not an offer to guarantee requiring notice of acceptance, but an acceptance in itself, of the vendor's proposal. Granting such an interpretation of the guaranty, this case represents the weight of authority on this point.[7] There is, however, some authority for holding that notice of acceptance is required in this case as much as when the guarantor makes the offer.[8] In view of the fact that the true basis of the general view as to notice, seems to be that of public convenience, there is much in favor of this minority view. For there is essentially as much necessity for a knowledge of one's possible liability, as when the guarantor makes the first move.

In the ordinary case, however, granting that notice should be given, it is important to determine whether the notice is a condition precedent or merely subsequent. There are cases which at least imply that the former is true: that until notice has been given no contract of guaranty exists.[9] It would seem, however, that the more logical view is, that the advance made or act done at the request of the guarantor, is the acceptance necessary to make a binding contract; but that the advantage of this may be lost if notice thereof is not given within a reasonable time.[10] And indeed, if this American doctrine is to be adopted, this latter view is the better.

That it is generally referred to as the "American" doctrine, is due not only to the fact that it does not exist in England, but that there is hardly a hint of it. As early as *Somersall* v. *Barneby*,[11] the question was raised; but the court held that no notice was necessary. And comparatively recently [12] this necessity was hinted at in the argument of counsel, three years having elapsed between the time of extending credit and the suit; but the court did not refer to the point in its decision, and held the guarantor liable. One of the leading American cases upholding the English view is *Douglass* v. *Howland*.[13] And Justice Cowan in that case undoubtedly criticizes the rule already promulgated in other courts; and lays it down that on principle no notice is necessary, the act done being the acceptance. Later cases in New York, however, appear to weaken the effect of

[7] See also Frost v. Standard Metal Co., 116 Ill. App. 642 (1904), and the rules laid down in Davis S. M. Co. v. Richards, *supra*, note 3.

[8] Evans v. McCormick, 167 Pa. 247 (1895); Columbia Baking Co. v. Schissler, 35 Pa. Super. 621 (1908).

[9] Davis S. M. Co. v. Richards, *supra*, note 3; Craft v. Isham, 13 Conn. 28 (1838).

[10] Anson, Contracts (11th Ed.), p. 32n.

[11] Cro. Jac. 287 (Eng. 1611).

[12] Sorby v. Gordon, 30 L. T. 528 (Eng. 1874).

[13] 24 Wend. 35 (N. Y. 1840).

this decision.[14] For they emphasize the fact that notice is unnecessary in the case of an *absolute guaranty;* with the resulting implication that it may be different in the case of an offer to guarantee. The effect of these cases is at least an intimation that eventually the ruling of the Federal courts will be followed in all the states. Purely as a matter of public convenience, this would probably be a beneficial result; yet it is difficult to see how it can be justified simply on principle.[15]

R. T. B.

INSURANCE—IS DEATH FROM PTOMAINE POISON AN ACCIDENT?—The usual policy of accident insurance limits the liability of the insurer, *inter alia,* to injuries or death effected through "external, violent and accidental means"; and the interpretation of this phrase has been productive of much litigation, remarkable because of the absence of conflicting decisions by the courts. This phrase, having been inserted in the policy by the insurers for the purpose of restricting their liability, is very strictly construed against them, in accordance with the usual policy of the courts in similar cases.

The words "external and violent" have had little, if any, effect upon the courts in the interpretation of the phrase, and most of the controversies have arisen over the interpretation of the word "accidental," which was defined by the Supreme Court of the United States in the case of *Mut. Acc. Assn.* v. *Barry,*[1] as follows: "The term 'accidental' was used in the policy in its ordinary, popular sense, as meaning happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected. If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means. But if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means." Apparently, the word is interpreted from an objective viewpoint; that is, if the injury is unexpected and unintended by the person injured, it may be accidental as to him, though the normal result of an intentional act of another person. Thus it has been held that where one person unexpectedly, and without provocation, purposely injures another, the injury is accidental as to the person hurt.[2] So also, if an insane or delirious person injures himself, the

[14] Natl. Bank v. Phelps, 86 N. Y. 484 (1881); Niles Tool-Works Co. v. Reynolds, 38 N. Y. Supp. 1028 (1896).

[15] For a more detailed discussion see "Notice of Acceptance in Contracts of Guaranty," 5 Columbia Law Rev. 215 (1905).

[1] 131 U. S. 100, 121 (1889). See also Etna Life Ins. Co. v. Vandecar, 86 Fed. 282 (1898); Bailey v. Interstate Casualty Co., 158 N. Y. 723 (1899).

[2] Hutchcraft v. Travelers Ins. Co., 87 Ky. 300 (1888); Fidelity, *etc.,* Co.